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No. 73-1274

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1973

Delta Air Lines, Inc.,
Petitioner

v.

Civil Aeronautics Board, et al.,
Respondents

BRIEF OPPOSING PETITION FOR CERTIORARI

Submitted by

CITY OF SAN ANTONIO
and
GREATER SAN ANTONIO CHAMBER OF COMMERCE

STATEMENT

The City of San Antonio and the Greater San Antonio Chamber of Commerce have long been working for improvements in air service and intervened in the proceeding before the Civil Aeronautics Board (Board)

because the proceeding could result in better service between Miami and San Antonio.

There is no airline route from San Antonio to Miami, although Eastern Air Lines has a route from San Antonio to New Orleans and another route from New Orleans to Miami. Eastern can provide service between San Antonio and Miami by stopping at New Orleans. It provides one such flight per day in each direction which is insufficient and inadequate.

The proceeding before the Board included the establishment of a new route between Houston and Miami. Continental Air Lines (Continental) has a San Antonio-Houston route. If it were awarded the route between Houston and Miami, it could provide better service between San Antonio and Miami via Houston. Consequently, San Antonio intervened in the proceeding before the Board and submitted evidence and testimony in support of an award to Continental.

The Board awarded the route to Continental, thereby improving San Antonio's air service.[1/] San Antonio also inter-

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1/ In contrast to Eastern's one round trip via New Orleans, Continental provides 2 1/2 round trips via Houston.

vened in and participated in the case before the Court of Appeals, urging affirmance of the Board's decision.

ARGUMENT

Delta Air Lines, the petitioner, lost its case before the Board and Court of Appeals on the merits. It is now contending that it was deprived of rights to which it was entitled under the so-called Ashbacker[2/] doctrine. Nothing presented by petitioner is new or novel, and there is no need for this court to review the decision of the court below. Petitioner argues that because the Board once had a Southern Transcontinental case, the Board could not reexamine the need for service in southern cities without having another Southern Transcontinental case. Petitioner is, in effect, claiming that it, rather than the Board, should determine the scope of proceedings before the Board. Here the Board heard the needs of communities for air service in separate proceedings rather than a consolidated one. For example, it looked at Albuquerque and decided to consider the need for service in five separate markets, in-

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2/ Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945).

cluding Chicago which by no stretch of the imagination can be considered a southern point. It also decided to consider the needs of Memphis for service in a different proceeding. Neither Memphis nor the State of Tennessee was included in the Southern Transcontinental Services Case, 33 C.A.B. 701 (1961).

Petitioner's argument is to the effect that the Board may not consider the needs of one discrete market without considering the needs of all other markets in the same or companion cases. Acceptance of such an argument would strait-jacket the Board and restrict its ability to deal with communities which have different needs for new and additional air transportation services at different times. This was made plain in an earlier appeal in this very case. National Air Lines, Inc., v. C.A.B., 392 F.2d 504 (D.C. Cir. 1968).

The public interest is the paramount interest. The Board structures its proceedings to insure an efficient, reliable, and adequate air transportation service to meet the needs of the public convenience and necessity. This point is not considered by the petition for a writ of certiorari which is based solely on procedural matters relating to the Ashbacker doctrine.

The decision below deals adequately with the application of the Ashbacker

doctrine to Civil Aeronautics Board proceedings. The doctrine has been used as a defensive maneuver by the air carriers in their competition for new route awards and in some cases has resulted in unduly lengthy proceedings.

While an air carrier has the right to file for the same route that another carrier applies for, an air carrier does not have the right to extend the route. Thus, if a carrier applies for a Houston-Miami route, an application for an Albuquerque-Miami route via Houston need not be consolidated for hearing and decision.

Petitioner contends that "when the Board commences a new route case sua sponte, as it did here, and itself selects specific route segments . . . the right of airlines to submit responsive applications is absolutely vital to a fair hearing . . ." (p. 17). The point is, however, that petitioner did not submit just a "responsive" application; its proposal went far beyond the scope of the proceeding. Petitioner misconceived the scope of the proceeding, but its misconception in this respect does not constitute any denial of due process.

The major cases on the facts here presented are Eastern Air Lines v. C.A.B.,

178 F.2d 726 (D.C. Cir. 1949) and Frontier Airlines, Inc. v. C.A.B., 349 F.2d 587 (10th Cir. 1965).

In the Eastern case, the District of Columbia Court of Appeals held that an application for service not confined to either the type of service or to the area under consideration did not require a consolidation of the application. In the Frontier case, the Tenth Circuit Court held that applications beyond the specified area of a proceeding need not be consolidated.

Petitioner is claiming that it should be heard on its application to provide service to points beyond the area under investigation. In the Frontier case, the court said,

> "But to extend such argument to ultimate conclusion would require the Board to equalize as far as possible all inherent advantage between applicants before a general investigation could go forward. The complexity of such procedure would destroy its worth and result in a hopeless administrative jumble." 349 F.2d at 591."

Petitioner argues that Delta Air Lines, Inc. v. C.A.B., 275 F.2d 632 (D.C. Cir. 1959), Cert. Den. 362 U.S. 969, is a

pertinent case and was overruled sub silentio by the court below. While petitioner may seek solace in that decision, the fact is that the decision is simply not relevant to the instant proceeding. That decision was concerned with the Board's using a limited area case to make a transcontinental award without appropriate restriction. Here, the Board has made appropriate restriction in a limited area case and specifically refused to make a transcontinental award. In view of the dissimilarity of the cases, citation to the Delta case is wholly unnecessary.

The Board proceeding has been monitored carefully by the court below. It reviewed the order fixing the scope of the case. National Airlines, Inc., v. C.A.B., 392 F.2d 504 (D.C. Cir. 1968). It reviewed the first decision of the Board. Continental Air Lines, Inc. v. C.A.B., 443 F.2d 745 (D.C. Cir. 1971). And, the instant proceeding is the result of a review of the Board's second decision.

Understandably, petitioner is unhappy with the decision. However, petitioner has not demonstrated any conflict in decisions applying the Ashbacker doctrine to Board proceedings. The result reached by the court below was compelled on the basis of a well-developed body of case

law dealing with Ashbacker and the Civil Aeronautics Board.

CONCLUSION

The relevant cases are clear and were properly applied to the facts of this case. There is no need for this Court to grant a writ of certiorari.

Respectfully submitted,

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March 21, 1974